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POLICE POWER; MUNICIPAL ORDINANCE. The Supreme Court of the United States has recently decided that a city ordinance providing that no person shall make any public address in any public grounds of the city, except in accordance with a permit from the mayor, does not violate the fourteenth amendment to the Constitution of the United States: *Davis* v. *Com. of Mass.*, 17 S. C. Rep. 731, (May 10, 1897). The question of the right to regulate public addresses, parades, assemblages, etc., has been treated in any but a uniform manner by the Supreme Courts of the States. The difficulty seems to be not so much the right of the State or city to regulate such rights but the manner in which said rights shall be regulated and the right to delegate the power to administrative officers. In Massachusetts, in the above case, and also in *Com.* v. *Abraham*, 156 Mass. 57 (1892), such a delegation of power to the park commissioners was held to be reasonable and the ordinance constitutional. In New York it was held, *Vance* v. *Hadfield*, 22 N. Y. S. R. 858; 51 Hun, 620, 643; 4 N. Y. Supp. 112 (1889), that an ordinance forbidding beating of drums or making any noise with any instrument whatever on any sidewalk, without written permission of the president of the village, is reasonable delegation

of police power. In California, *In re Flaherty*, 105 Cal. 558 (1895), an ordinance making it unlawful to beat a drum upon any traveled street without special permit, and giving a city officer power to grant permission, is reasonable delegation of power.

On the other hand, in Wisconsin, *State* v. *Dering*, 84 Wis. 585 (1893), it was held that an ordinance forbidding street parades, beating drums, etc., on certain streets without written permission of the mayor, but excepting from its provisions certain classes of organizations, is unreasonable and unconstitutional in giving to the mayor arbitrary power. And in Michigan, *In re Frazer*, 63 Mich. 396 (1886), a similar ordinance was declared to be unreasonable and void. So, in Oklahoma, *In re Gribben*, 47 Pac. Rep. 1074 (1897).

So, in Illinois, *Chicago* v. *Trotter*, 136 Ill. 430 (1891), an ordinance providing that no street parade shall be allowed upon certain streets without permit from police department specifying routes, etc., is unreasonable and unconstitutional, as council cannot delegate its legislative power to a mere executive officer.

It would seem that the decision of the United States Supreme Court is based upon sound law and common sense. Citizens have certain absolute rights, among them free speech and the use of the highway, but these rights may be abused as well as used, and in order to prevent abuses and protect the same rights in other citizens, there should be proper regulations for the exercise of those rights. When there regulations are made general in their nature so as not to discriminate for or against any class, and the power to enforce these regulations is delegated to a proper executive officer, there would seem to be little ground for objections.

NEGLIGENCE AT RAILROAD CROSSINGS; IDENTIFICATION. What duties do the various courts impose upon a traveler who approaches a grade crossing on the highway? A late decision of the Circuit Court of Appeals, *Pyle* v. *Clark et al.*, 79 Fed. Rep. 744 (March 22, 1897), well illustrates the rule adopted by the Federal courts on this subject.

In this case the plaintiff, Pyle, was driving in a wagon with his friend, Wright, when they approached a grade crossing of the Union Pacific Railway (operated at the time by the defendant, Clark and others, as receivers). They stopped at some distance from the track to allow a train to pass, and then drove across, looking only down the track toward the south. A train came from the north at a high rate of speed, and without any warning struck the wagon and injured them both. Suits having been brought, Wright was allowed to recover, but Pyle was barred from so doing on the ground of contributory negligence.

In the part of the judgment relating to the action brought against the railway company by Pyle (the driver of the wagon), Judge Sanborn lays down the rule which has been uniformly adopted by the Federal courts: "It is the duty of everyone approaching a

railroad to look both ways and to listen; and when a diligent use of the senses would have avoided the injury, failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court." This is evidently adopted from the language of Justice Field, in *R. R. Co.* v. *Houston*, 95 U. S. 697 (1877), showing that the Federal Judges consider it negligence *per se* to omit either to look or to listen.

In Pennsylvania the same rule is applied with the addition that it is the imperative duty of the traveler to stop before he attempts to cross the track. Justice Dean, in *Gray* v. *Penna. R. R.*, 172 Pa. 383 (1896), quotes with approval the language of Justice Mitchell in a previous case: "The rule that a traveler must stop, look, and listen is an absolute and unbending rule of law." So rigidly is this rule applied that the "stop" is construed in its literal sense, and a "bicycler's stop," which enables the rider to obtain a fairly clear view of the track has been held insufficient: *Robertson* v. *Penna. R. R.*, 180 Pa. 43 (1897). In New York the Pennsylvania rule, that to stop is necessary, has been utterly discredited: *Neudoerffer* v. *B. H. R. R.*, 9 App. Div. 66 (1896), and this State, together with most of the others, follows the rule of the Federal courts. However, cases in Texas and Georgia have gone to the other extreme, and decide that no *specific* duties are imposed upon the traveler, the omission of which will render him guilty of negligence, but that he must simply use the care to be expected of an ordinarily prudent man: *I. & G. N. R. R.* v. *Dyer* (Tex.), 13 S. W. Rep. 377 (1890); *R. & D. R. R.* v. *Howard* (Ga.), 3 S. E. Rep. 426 (1887).

It will be observed that in the case of *Pyle* v. *Clark*, *supra*, the court allowed Wright, who was sitting in the wagon with Pyle, to recover, the reason being that he was not considered to be identified with Pyle so as to be responsible for the latter's contributory negligence. The repudiation of the doctrine of identification is now well settled in the Federal courts, all cases on this subject following *Little* v. *Hackett*, 116 U. S. 366 (1885). Likewise, after a number of shifting decisions, the same is declared to be the law in all the States of this country except Michigan and Wisconsin, whose courts still apply the rule of identification laid down in *Thoroughgood* v. *Bryan*, 8 C. B. 115 (1849), where a rider in a private conveyance is injured through the negligence of the driver: *Cuddy* v. *Horn*, 46 Mich. 596 (1881); *Otis* v. *Janesville*, 43 Wis. 422 (1879).

CARRIERS; EXPRESS MESSENGER; EXEMPTION FROM LIABILITY FOR NEGLIGENCE. For the first time, apparently, a Federal court has been called upon to consider the validity of a contract exempting a railroad company from liability for injuries to an express messenger arising through the negligence of its servants. In *Voight* v. *R. R.*, 79 Fed. 561 (March 29, 1897), the messenger released the railroad company from liability for negligence. He was injured

through negligence of the railroad's employees and sued the company. Defendant set up the agreement between the parties. The Circuit Court for the Southern District of Ohio held the agreement void as against public policy and allowed a recovery. In reaching this decision, the court repudiated the decisions in the only cases that have raised the question in the state courts, viz.: *Bates* v. *R. R.*, 147 Mass. 255 (1888); *Hosmer* v. *R. R.*, 156 Mass. 506 (1892), and *Louisville, Etc.*, *R. R.* v. *Keefer* (Ind.), 44 N. E. Rep. 796 (1896).

The court placed its decision on two grounds: (1) That though a railroad company is under no obligation, in its capacity as common carrier, to receive the plaintiff as a passenger into its baggage cars, yet when it does receive him into those cars under a special contract, it is performing the function of a common carrier and the plaintiff becomes a passenger for hire; (2) That if plaintiff was a passenger for hire the contract in ease of the company's liability for negligence is void, as being contrary to public policy: *R. R. Co.* v. *Lockwood*, 17 Wall. 357 (1873).

The point, then, in which this decision differs from the three above quoted, is in holding that the messenger is a passenger, or, to put the same thought in other words, that the carrier is, as respects him, a common carrier and not a special carrier. All the cases cited agree that *R. R. Co.* v. *Lockwood* is a sound decision, but distinguish it on the ground that there the railroad held itself out as a carrier, and also that there was clearly a compensation received by the carrier for the issuing of so-called free passes to drovers, authorizing them to ride on the trains on which their cattle were carried. They hold that a railroad cannot be considered a carrier of passengers by baggage cars, that they are places of great danger, and that if the messenger were there without permission he might be ejected, and that hence in view of the fact that the railroad granted this special and unusual privilege, no public policy is transgressed by a stipulation for exemption. It is said in *Bates* v. *R. R.*, "The contract did not diminish the liability of the defendant. It left the risk assumed by the plaintiff in riding in the baggage car what it would have been without the contract; it only secured him against being ejected from the car. . . . The question of the right of carriers to limit their liability for negligence in the discharge of their duty as carriers by contracts with their customers or passengers in regard to such duties, does not arise under this contract as construed in this case.—*R. R.* v. *Lockwood.*"

In *Louisville, Etc.*, *R. R.* v. *Keefer*, the court took the view that in making such a contract a railroad company is doing something outside the scope of its occupation as a common carrier, something it is not legally compellable to do, and hence contracts in the capacity of a special carrier, and may therefore stipulate against its own negligence without violating any rule of public policy. In the latter case an analogy was drawn from the cases which decide that a contract to transport the private cars of a traveling

circus is not the contract of a common carrier: *Coup* v. *Ry. Co.*, 56 Mich. 111 (1885); *Ry. Co.* v. *Wallace*, 14 C. C. A. 257 (1895).

CONSTITUTIONAL LAW; ELEVENTH AMENDMENT. There has been, in recent years, a divergence of opinion as to what constitutes a suit against a State within the meaning of the eleventh amendment to the Constitution of the United States. In *Tindal* v. *Wesley*, 17 Sup. Court Rep. 770 (May 10, 1897), the plaintiff, having bought land from the Commissioners of South Carolina, brought ejectment against the Secretary of State, who had ousted him by virtue of his official authority as having charge of all State property. The defense was that the suit was in effect against the State, and therefore the Circuit Court had no jurisdiction.

Mr. Justice Harlan, in affirming the judgment for the plaintiff, relied principally on *U. S.* v. *Lee*, 106 U. S. 192 (1892). That case decided that where the agents of the United States held the Arlington Cemetery for the public use of the government, a suit in ejectment against them was not a suit against the United States, but only against the individuals as trespassers, and that such an action was maintainable as it did not conclude the rights of the United States: *Carr* v. *U. S.*, 98 U. S. 433 (1878).

In cases arising under the eleventh amendment, the earlier doctrine was that if the State was not a party to the record, the suit was not against it: *Davis* v. *Gray*, 16 Wall. 203 (1872). This view has been abandoned, and the test is now whether the State is substantially interested in the event. In *Louisiana* v. *Jumel*, 107 U. S. 711 (1882) it was held that a mandamus would not lie against the auditor and treasurer of Louisiana to compel them to pay bonds of the State, as they were not mere agents, but servants of the State, and the effect would be to compel the State to perform its contract. Wherever that would be the effect of a judgment, the suit is really against the State: *Hagood* v. *Southern*, 117 U. S. 52 (1886); *In re Ayres*, 123 U. S. 443 (1887). If the State is an indispensable party to the record to enable the court to grant relief, the suit is against the State: *Cunningham* v. *Macon, &c. R. R.*, 109 U. S. 447 (1883). But a suit in detinue against a treasurer who levied on the plaintiff's property for non-payment of taxes, under a void law, is an action against the wrongdoer as an individual, and not against the State: *Poindexter* v. *Greenhow*, 114 U. S. 270 (1884). And the Circuit Court will restrain a State officer from executing an unconstitutional statute which violates the contract made by the State with the plaintiff. As no affirmative official action is there required from the State, through its officers, it is not a suit against the State: *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (1890); *In re Tyler*, 149 U. S. 164 (1892). So a suit in tort will lie against an officer who seizes the plaintiff's goods under an unconstitutional statute: *Scott* v. *Donald*, 165 U. S. 58 (1897), where the defendant, as constable, seized the plaintiff's liquor

under the South Carolina dispensary law, which was held unconstitutional as far as it affected interstate commerce.

From these cases it will be seen that in determining whether the suit is to be considered as against the State regard must be had to the nature of the case as presented by the whole record, not merely to nominal parties to it. As the plaintiff in the case under discussion is not suing the defendants to enforce specific performance of a contract by the State, but to recover property wrongfully taken by the defendants as individuals under color of state authority, the case falls under the rule of *U. S.* v. *Lee* (*supra*), and the line of cases ending in *Scott* v. *Donald* (*supra*).

The judgment in this case only decides the title as between the plaintiff and the defendant; and the State, not having submitted its rights in the case to the determination of the court, is not concluded by that judgment. Therefore as the suit does not affect the state, it is not a party in interest, and the suit cannot be said to be against it within the meaning of the eleventh amendment.

MASTER AND SERVANT; WRONGFUL DISCHARGE; MEASURE OF DAMAGES. The Supreme Court of Wisconsin, in the case of *Tickler* v. *Andræ Mfg. Co.*, 70 N. W. Rep. 292 (Feb. 27, 1897), decided that a servant wrongfully discharged cannot recover his expenses in seeking other employment, though the wages so received have been credited in reduction of damages. The established rule of law governing such cases is that the servant is entitled to recover his wages for the balance of his term less what he has made or might have made from some subsequent employment during the balance of the term, and that he is bound to use due diligence in seeking such subsequent employment: *Chamberlain* v. *Morgan*, 68 Pa. 168 (1871); *Champlain* v. *Trans. Co.*, 31 Vt. 162 (1858); *Perry* v. *Simpson, Etc., Co.*, 37 Conn. 520 (1871); *Howard* v. *Daly*, 61 N. Y. 362 (1875); *Bennett* v. *Morton*, 46 Minn. 113 (1891). Of course the damages must be limited in any case to the contract price for the entire term: *Bradshaw* v. *Branan*, 5 Rich. 465 (1852); *McDaniel* v. *Parks*, 19 Ark. 671 (1858). The discharged servant, *prima facie*, has a right to recover for the whole term and the burden of proof is on defendant to show that plaintiff has not used reasonable diligence to secure employment elsewhere. What amounts to reasonable diligence is a question of fact for the jury in any given case: *Byrd* v. *Boyd*, 4 McCord (S. C.), 246, (1827); *Howard* v. *Daly* (*supra*).

In the present case the trial court took the view that, as the master might show, in mitigation of damages, that the servant had secured other employment, the servant should be credited with reasonable expenses incurred in seeking new employment. The Supreme Court reversed the judgment, holding that the manner of obtaining employment and the place where best it may be obtained are questions to be decided by the servant himself, and that any traveling or expenses that he may consider necessary for the purpose

are matters entirely within the exercise of his own discretion, and which cannot concern the former employer. The point seems never to have been raised before.

It might be argued that the ruling of the trial judge is more likely to secure justice than that of the Supreme Court. To hold that a discharged servant must use diligence in seeking other employment, so as to reduce his master's damages, and to hold further that he cannot be credited with the expense of reasonable efforts to secure new employment, and cannot even have the question of the reasonableness of such expense submitted to a jury, seems contradictory. It is commanding a man to use due diligence, and then punishing him for its exercise by refusing him a credit for expenses incurred in his attempt to save his master from liability. If the question of what is reasonable diligence is for the jury, certainly that body would seem to be competent to determine whether or not the expenses incurred were proper.

HUSBAND AND WIFE; COMPETENCY OF WITNESSES. The Court of Criminal Appeals of Texas, in the case of *Miller* v. *State*, 40 S. W. Rep. 313 (April 28, 1897), decided that under the Texas Statute a prosecuting wife is not a competent witness against her husband for an abortion perpetrated by him prior to their marriage. The well-known common law rule is that a wife cannot be received as a witness for or against her husband except in suits between them or in criminal cases where he is prosecuted for an act of personal violence committed against her.

In the United States, state statutes on the subject universally exist. The Texas statute reads: "The husband and wife . . . shall in no case testify against each other, except in a criminal prosecution, for an offence committed by one against the other:" Code Cr. Prac., 1895, Arts. 774 and 775. It is practically declaratory of the common law on this point and was rightly construed according to that law.

The abortion in this case was effected by drugs. If administering drugs for such a purpose is not an act of personal violence, in accordance with the rule, of course the evidence was not admissible. Nor assuming that the offence was one of personal violence would the evidence be admissible. The crime was not committed against the defendant's *wife* but against, at the time, an unmarried woman. Neither could she testify as an unmarried woman for she was his wife at the time she was called to the stand. In other words, in cases of this kind, the evidence, to be admissible, must be of acts of personal violence committed by a husband or wife against the other after marriage: *Pedley* v. *Wellesley*, 3 Car. and P. 559 (1829); *State* v. *Evans*, 39 S. W. (Mo. Sup.) 462 (1897). But see *Com.* v. *Kreuger*, 17 Co. Ct. Rep. (Pa.) 181 (1896).

The common law restriction on the competency of the husband or wife as a witness against the other being based on principles of public policy, statutes purporting to change the rule are construed

with the greatest strictness. No mere general statutes permitting all persons to testify regardless of interest affect the marital incapacity. The rule must be changed expressly or by necessary implication: *Dwelly* v. *Dwelly*, 46 Me. 377, 380 (1859); *Lucas* v. *Brooks*, 18 Wall. 436, 452 (1873); *In re Jones*, 6 Biss. 68 (1874); *Gibson* v. *Com.* 87 Pa. 253 (1878). The rule as laid down in these cases is according to the decided weight of authority. *Contra*, see *Merriam* v. *Hartford*, 20 Conn. 354, 362 (1850); *Berlin* v. *Berlin*, 52 Mo. 151, 153 (1873).

CARRIERS; WHO IS A PASSENGER. In *Missouri, K. & T. Ry. Co. of Texas* v. *Williams*, 40 S. W. 350 (Tex. Civ. App.) (Mar. 31, 1897), a person was held a passenger under somewhat novel circumstances. A boy without a ticket, but with money, and intending, as he said, to pay fare, climbed on the front platform of an express car, which the conductor could not reach while the train was in motion. The boy's excuse for choosing this rather unsuitable place for boarding the train was that he was late in reaching the station, and was obliged for his own safety to get on the front end of the first car which came by him. There was nothing to show that his tardiness was due to any fault of the company.

This exact state of facts seems never before to have been passed upon judicially. In *Perry* v. *Central R.*, 66 Ga. 746 (1879), Perry had bought a ticket, and was standing near the platform when the train started. He ran in pursuit and was injured. He was held not a passenger. See also *Webster* v. *Fitchburg R.*, 161 Mass. 298, 37 N. E. 165 (1894); *Baltimore Traction Co.* v. *State*, 78 Md. 400, 28 Atl. 397 (1894). In *Sharrer* v. *Paxson*, 171 Pa. 26 (1895), it was decided that a passenger who has safely boarded a moving train is entitled to all the rights of any other passenger. But in that case the injured person had gotten on an ordinary passenger coach.

The cases have held for the most part that one boarding a car manifestly not intended for passengers, and without the invitation, express or implied, of the company, cannot claim a passenger's rights: *Files* v. *Boston & A. R.*, 149 Mass. 204 (1889); *Powers* v. *Boston & M. R.*, 153 Mass. 188 (1891); *Stringer* v. *Missouri P. R.*, 96 Mo. 299, 302 (1888); *Eaton* v. *Delaware, L. & W. R.*, 57 N. Y. 382 (1874).

It would be interesting to speculate on how far the decision in the principal case might be carried. It would seem that under it any one with a "*bona fide* intention" to become a passenger has a wide choice of places for boarding a train. But the decision is deprived of much of its weight by the fact that the injury was so wanton that recovery would have been allowed, even though the injured person had been a trespasser.

CONTRACTS OF FOREIGN CORPORATIONS. The question presented in *Sullivan* v. *Beck et al.*, 79 Fed. 200 (1897) is of importance in every state where foreign corporations are subject to regulations.

By sections 3453 and 3454, 2 Burns Rev. St. Ind. 1894, an agent of a foreign corporation is required to register in the county in which he proposes to do business and to file an order or resolution of the board of directors authorizing suit to be brought against them by service of process on him. Section 3056 (*Id.*) provides that: "Such foreign corporations shall not enforce, in any court of this state, any contracts made by their agents or by persons assuming to act as their agents, before a compliance by such agents or persons acting as such with the provisions of sections 3453 and 3454 of this act."

An agent of the company plaintiff, incorporated under the laws of Illinois, without complying with the requirements of sections 3453 and 3454 of the above act, executed in Indiana on Sept. 29, 1890 a bond and mortgage on real estate. This action was a bill by the receiver of the company plaintiff to foreclose the mortgage. The defendants filed a plea in abatement.

It was held by Baker, District Judge, that the contract was valid. Section 3456 does not purport to invalidate any contract entered into before compliance with the statutory requirements. The only inhibition is that it shall not be enforced in the courts of the State until the requirements are complied with: *Machine Co.* v. *Caldwell*, 54 Ind. 270 (1876); *Domestic Co.* v. *Hatfield*, 58 Ind. 187 (1877); *Daily* v. *Insurance Co.*, 64 Ind. 1 (1878); *Manufacturing Co.*, v. *Brown*, *Id.* 548 (1878); *Insurance Co.* v. *Wellman*, 69 Ind. 413 (1879); *Elston* v. *Piggott*, 94 Ind. 14 (1883); *Wiestling* v. *Warthin*, 1 Ind. App. 217, 27 N. E. 576 (1891); *Guarantee Co.* v. *Cox* (Ind. Sup.), 42 N. E. 915 (1896). The terms of section 3456 refer only to state courts, and are not binding on the national courts: *Hervey* v. *Railway Co.*, 28 Fed. 169 (1884); *Farmers Loan & Trust Co.* v. *Chicago & N. P. R. Co.*, 68 Fed. 412 (1895). Hence the valid contract, although non-enforceable in the state courts, can be enforced in the Federal courts. The plea in abatement was therefore insufficient, and leave was given to answer again.

COVENANTS RUNNING WITH THE LAND; POSSESSION OF GRANTOR; HUSBAND AND WIFE; IS POSSESSION BY ONE POSSESSION BY BOTH?

In *Mygatt* v. *Coe* (Court of Appeals of New York), 46 N. E. 948 (April 20, 1897) Coe joined in a deed of his wife's separate real estate, with covenants of warranty and quiet enjoyment. He had been living on the land in question as head of the family, had paid the taxes and kept the premises in repair. It was, nevertheless, held by a divided court (four to three) that the husband was not in possession and that consequently his covenants did not run with the land. O'Brien, J., delivering the majority opinion, admitted a hardship to the plaintiffs but asserted the necessity of adhering to the old common law rule. There must have been transfer of possession from grantor to grantee, else there could be no land to which the covenants might be annexed.

Bartlett, J. (dissenting) said it was "not possible to say that Coe was a stranger to the title and transferred no estate to which his covenant of warranty could attach," quoting Finch, J., in *Mygatt* v. *Coe*, 142 N. Y. 86, 36 N. E. 870 (1894). See also dissenting opinion of Haight, J., in *Mygatt* v. *Coe*, 147 N. Y. 467 (1895).

The question of how great an interest in the grantor is necessary to cause the covenants of warranty and quiet enjoyment to run with the land is historically interesting: *Noke* v. *Awder*, Cro. El. 373, 436 (1594); *Beddœ* v. *Wadsworth*, 21 Wend. (N. Y.) 120 (1839); *Slater* v. *Rawson*, 1 Met. (Mass.) 450 (1840); 6 Id. 439 (1843); *Wilson* v. *Widenham*, 51 Me. 566 (1863); *Dickson* v. *Desire*, 23 Mo. 151 (1856); *Fields* v. *Squires*, 1 Deady (C. C. U. S.) 366, 389 (1868); *Wead* v. *Larkin*, 49 Ill. 99 (1868); Id. 54 Ill. 489 (1870); Rawle on Covenants for Title (5th Ed.) § 203.

The later cases all hold that mere possession in the grantor is sufficient. The controversy now is what constitutes possession. The majority of the court in the principal case, after stating that Coe negotiated the sale, executed a written contract of sale in his own name and himself received a part of the purchase money, said that these facts (and the others indicated above) did not show such interest or possession on the part of the husband as to carry his covenant down through the line of conveyances to the plaintiff. "They are all such acts of care, management and agency by the husband with respect to his wife's property as naturally and necessarily proceed from the relation of husband and wife."

The decision might have been otherwise in some states: Endlich & Richards on Married Women in Pennsylvania. § 226, seem to take the husband's liability on covenants for title in a deed of his wife's separate property as a matter of course, the only doubt being in regard to the wife's responsibility. Nothing is said about covenants running with the land but there seems no reason why, if the point should come up, the Pennsylvania courts might not hold the possession of the husband amply sufficient to carry the covenants.

See, as to husband's headship of family and possession of wife's real estate, *Johnson* v. *Fullerton*, 44 Pa. 466 (1863).

For excellent discussions of what constitutes possession in general, see *Williams* v. *Buchanan*, 1 Iredell's Law (N. C.), 535 (1841); *Bynum* v. *Carter*, 4 Iredell's Law (N. C.), 310 (1844); *Swift* v. *Agnes*, 33 Wis. 228, at 240 (1873).